No. 2708

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY RODEN,

Plaintiff in Error,

vs.

WILLIAM DETTERING,

Defendant in Error.

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, Judge.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

This is an action brought by William Dettering, plaintiff, now defendant in error, vs. Henry Roden, defendant, now plaintiff in error. The complaint recites that the defendant was an attorney at law engaged in the practice of law at Fairbanks, Alaska, on the 17th day of February, 1910, and at that time the plaintiff was the owner of seventeen thousand dollars ($17,000) in gold dust which was on deposit in the Washington Alaska Bank in Fairbanks, Alaska. That the plaintiff employed the defendant as his attorney to represent him in certain litigation then pending. The evidence shows that the defendant was given a power of attorney by the plaintiff and authorized to

act on behalf of the plaintiff during the plaintiff's absence in the States. The complaint charges that while the defendant was so acting as the attorney for the plaintiff, he the defendant wilfully, fraudulently and without authority withdrew, signed away, disposed of, and delivered over to other persons and wrongfully, wilfully and fraudulently consented and permitted to be delivered over to other persons adverse to the plaintiff the seventeen thousand dollars ($17,000.00) in gold dust heretofore mentioned. The cause was originally commenced in the Superior Court of the State of Washington for King County. At a proper time the defendant, now plaintiff in error, filed his petition and bond praying the removal of the cause to the United States District Court for the Western District of Washington, Northern Division. The order of removal was duly signed and the cause transferred to the United States Court. After the case was docketed in the United States Court the defendant demurred to the complaint and subsequently answered. The case was set down for trial and brought on for hearing before the court sitting with a jury. The jury returned a verdict against the defendant, now plaintiff in error, in the sum of sixty-five hundred dollars ($6,500.00) upon which verdict a judgment has been duly entered and from said judgment the defendant, now plaintiff in error, has secured a writ of error.

ASSIGNMENT OF ERROR

The plaintiff in error's first assignment of error reads as follows:

I.

"The Court erred in considering the cause or any part thereof, and in entering judgment therein, because it affirmatively appeared from the files and proceedings that the defendant was at the commencement of the action and at all the times mentioned in the Complaint, a resident and citizen of the Territory of Alaska, and remained such at all times after the commencement of the action and of the filing of judgment herein, and that the plaintiff was at all of said time a resident and citizen of the State of Washington. That because of said facts the cause was not removable to the United States District Court for the Western District of Washington, Northern Division, and the said Court had no jurisdiction of the persons or the subject matter hereof."

The plaintiff in error's second assignment of error charges that the Court erred in denying the challenge of the sufficiency of the evidence and for an instructed verdict made at the close of the evidence by the defendant, which error is based upon the following grounds:

"(a) Because it affirmatively appears upon the record and pleadings and from all the proceedings that the Court had no jurisdiction of the parties or of the subject matter of the action, because the cause was between a citizen of the Territory of Alaska and the State of Washington and was not removable to the United States District Court for the Western District of Washington."

The only question before the Court is, did the United States District Court for the Western District of Washington, Northern Division, have jurisdiction over the cause and was the cause one which was removable from the State to the Federal Court?

ARGUMENT

The petition for removal is based upon a diversity of citizenship and recites in part as follows:

"The entire controversy therein is between the above named plaintiff, William Dettering, on the one side, who at the time of the commencement of this action was, ever since has been and now is a citizen of the United States, a citizen of the State of Washington, residing in the Western District of Washington and residing in King County, State of Washington, and residing within the jurisdiction of this court; and your petitioner, Henry Roden, the above named defendant on the other side, is not now and was not at the time of the commencement of this action and never has been at any time whatsoever a citizen or resident of the State of Washington, but is now and at all times has been a citizen and a resident of Alaska." (See Transcript of Record, p. 9.)

The affidavit upon the bond of removal signed by Henry Roden the plaintiff in error recites that he is now and for the past seventeen years has been a resident of the Territory of Alaska; that at the present time he is a resident and citizen of Alaska, residing at Iditarod; that he is not now and never has been a resident of the State of Washington. Paragraph I of plaintiff's amended complaint recites as follows:

"That the defendant now is and at all times hereinafter named was an attorney at law duly authorized and licensed to practice law in the District of Alaska." (Transcript of Record, p. 14.)

The testimony of Henry Roden undisputed is as follows:

"I am defendant in this case. I arrived in Alaska in February, 1908. I went in through Canadian territory; in 1910 I went into the Iditarod country and have been there ever since." (Transcript of Record, p. 110.)

It is apparent from the petition on removal and from the foregoing citations that the defendant in error was at the time of the commencement of the action and at the time of filing the petition and at the time of hearing of the cause a resident and citizen of the Territory of Alaska. The plaintiff in error now contends that the District Court had no jurisdiction over the cause and that this court has no jurisdiction over the cause for the reason that the Federal Statutes do not give Federal Courts jurisdiction over cases between residents and citizens of a territory and residents and citizens of a state. The judicial code enacted March 3, 1911 (see Federal Statutes Ann. Vol. 1 Supplement, 1912, pp. 139-145), provides that the district courts of the United States shall have original jurisdiction as follows:

"Sec. 24. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs the

sum or value of three thousand dollars ($3,000) * * * and (b) is between citizens of different states."

Section 28 provides:

"Any other suit of a civil nature at law or in equity of which the district courts of the United States are given jurisdiction by this title and which are now pending or may hereafter be brought in any state court may be removed into the district court of the United States for the proper district by the defendant or defendants therein being non-residents of that state. * * * And where a suit is now pending or may hereafter be brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district. * * *"

It will be seen from these citations that the United States District Courts have original jurisdiction only when the controversy is between citizens of different states and that causes are removable only in such cases where the United States District Courts have this original jurisdiction or in such cases where the controversy is between a citizen of the state in which the suit is brought and a citizen of another state.

In *Re Winn,* 213 U. S., p. 456, 53 L. Ed. 873, the Supreme Court of the United States said:

"It is well settled that no cause can be removed from the state court to the circuit court of the United States unless it could originally have been brought

in the latter court. *Boston & M. Consol. Copper & S. Min. Co. vs. Montana Ore Purchasing Co.,* 188 U. S. 632, 47 L. Ed. 626, 632, 23 Sup. Ct. Rep. 434; *Ex parte Wisner,* 203 U. S. 449, 51 L. Ed. 264, 27 Sup. Ct. Rep. 150."

Therefore the sole question in this case is, does the record show that the plaintiff in error was a resident and citizen of any other state or of a state?

The plaintiff in error now contends that it does not so show but that it affirmatively appears that he at all times was a resident and citizen of the Territory of Alaska, and that a resident and citizen of a territory is not a resident and citizen of a state as required by the act giving jurisdiction to the United States District Courts either original or on removal. In the first place it is finally settled that Alaska is a territory and a part of no state.

> See *Interstate Commerce Commission ex rel. Humboldt S. S. Co.,* 224 U. S. 472, 56 L. Ed. 849.

It is also firmly settled that when one of the parties to an action is a resident and citizen of a territory then the parties are not "citizens of different states," and there is not such a diversity of citizenship as is required to give the Federal Courts jurisdiction over the case.

In the *Corporation of New Orleans vs. Winter, et al.,* 1 Wheaton, p. 90, 4 L. Ed., p. 44, the Supreme Court of the United States said:

"Marshall, Ch. J., delivering the opinion of the Court, and after stating the facts, proceeded as follows:

"The proceedings of the court, therefore, is arrested *in limine,* by a question respecting its jurisdiction. In the case of *Hepburn* & *Dundas vs. Ellzey,* this Court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

"It has been attempted to distinguish a territory from the District of Columbia; but the court is of the opinion that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the Court, that a citizen of Columbia was not capable of sueing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a territory. Gabriel Winter, then, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana."

In the case of *Barney vs. Baltimore,* 73 U. S., p. 280, 18 L. Ed. 825, at page 827, the Court said:

"In the case of *Hepburn vs. Ellzey,* 2 Cranch, 545, it was decided by this Court, speaking through Marshall, Ch. J., that a citizen of the District of Columbia was not a citizen of a state within the meaning of the Judiciary Act, and could not sue in a Federal Court. The same principle was asserted in reference to a citizen of a territory in the case of *N. O. vs. Winter,* 1 Wheat., 91, and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, if suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts, when the

point has arisen. *Westcott vs. Fairfield,* 1 Pet. C. C. 45."

See also:

Hooe vs. Jamison, 17 Supreme Court Rep., 596, 166 U. S., p. 395.
Cameron vs. Hodges, 8 Sup. Ct. Rep., 1154, 127 U. S., p. 322.

To like effect are:

Snead vs. Sellers, 66 Fed. 371.
California Oil & Gas Co. vs. Miller, 96 Fed. 12.
Weller vs. Hanaur, 105 Fed. 193.
Watson vs. Bonfils, 116 Fed. 157.
McClelland vs. Kane, 154 Fed. 164.
Maxwell vs. Federal Gold & Copper Co., 155 Fed. 110.
Clark vs. Southern Pacific Railroad, 175 Fed. 124.

It is well settled that where no district court has jurisdiction over the cause such jurisdiction cannot be conferred by the consent or by any act of the parties. It is the duty of the appellate court to investigate the jurisdiction of the lower court on its own motion even though such jurisdiction is not questioned by the parties.

See *Louisville & N. R. Co. vs. Mottley,* 211 U. S. 149, and cases cited.
Also *Re Winn,* 211 U. S. 458, 53 L. Ed. 873.
Rife vs. Lumber Underwriters, 204 Fed. 32, and cases cited.

In *Utah Nevada Co. vs. DeLamar,* 133 Fed. 113, this Court (Circuit Court of Appeals for 9th Circuit) speaking through Judge Hawley, said:

"The question of the jurisdiction of the Court in cases like the present one can be taken at any time pending the proceedings. It need not be presented by any assignment of error. It may be raised by the Court of its own motion. Failure of the parties to raise the question, or consent to waive it, does not prevent the Court from considering it. This Court has twice so decided. *Craswell vs. Belanger,* 56 Fed. 529, 6 C. C. A. 1; *German Savings & Loan Soc. vs. Dormitzer,* 116 Fed. 471, 53 C. C. A. 639. In *Minnesota vs. Northern Securities Co.,* 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870, the Court Said:

'After the cause was argued here, the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one, and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield, C. & L. M. Railway Co. vs. Swan,* 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Robertson vs. Cease,* 97 U. S. 646, 24 L. Ed. 1057; *King Bridge Co. vs. Otoe County,* 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; *Parker vs. Ormsby,* 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; *Mattingly vs. Northwestern Va. R. R.,* 158 U. S. 53, 57, 15 Sup. Ct. 725, 39 L. Ed. 894; *Great Southern Fire Proof Hotel Co. vs. Jones,* 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 482; *Continental National Bank vs. Buford,* 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119; *Defiance Water Co. vs. Defiance,* 191 U. S. 184, 194, 24 Sup. Ct. 63, 48 L. Ed. 140.'"

The question of jurisdiction can be raised at any

stage of the proceedings and the fact that the party claiming lack of jurisdiction was the one who removed the cause does not estop that party from raising the question in the appellate court.

In *German Savings & Loan Society vs. Dormitzer,* 116 Fed. 471, the Court, speaking through Judge Ross, said:

"This suit was commenced in a state court of Washington, from which, on the petition of the appellant, it was transferred to the Circuit Court of the United States for the District of Washington, in which court it was tried on its merits, and a decree entered therein, from which decree the German Savings & Loan Society took and was allowed an appeal. Upon the calling of the case for argument in this court, counsel for the appellant announced that they had just discovered that the suit was improperly removed from the state court, and that the circuit court had not, nor has this court, any jurisdiction over it, for the reason that the case presented no separable controversy, nor did such diverse citizenship exist as would confer jurisdiction upon the federal court. As the case was removed from the state court upon the petition of the appellant, it is insisted on the part of the appellees that it is estopped from now raising the question of jurisdiction. * * * In the case of *Railroad Company vs. Swan,* 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462, and in other cases there cited, the supreme court declared the rule to be inflexible and without exception that the judicial power of the United States cannot be exerted in a case to which it does not extend, even if both parties desire it to be exerted; and that the court 'must, of its own motion, deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record, on which, in the exercise of that

power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' See, also, *Craswell vs. Belanger*, 6 C. C. A. 1, 56 Fed. 529, and numerous cases there cited."

Because of the apparent jurisdictional defect we deem it useless to discuss the remaining assignments of error.

We respectfully submit that the judgment of the District Court should be set aside.

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and STANLEY J. PADDEN,
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